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No.

IN THE

Supreme Court of the United States

MICHAEL J. VALLONE, JOYCE E. HEIDEMANN AND JAMES J. O'KEEFE, PETITIONERS

v.

CAN FINANCIAL CORPORATION, A/K/A CNA CASUALTY OF ILLINOIS AND THE CONTINENTAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's decision in *Varity Corp. V. Howe*, 516 U.S. 489 (1996) recognized that fiduciary duty claims may arise under ERISA.

The Seventh Circuit has interrupted *Varity* as limiting claims brought against a fiduciary for failing to accurately and completely provide information to plan participants to only those claims where there is proof that a fiduciary has acted with a subjective intent to deceive employees under a plan.

The Second, Third and Sixth Circuits have interpreted *Varity* as permitting claims against a fiduciary even in the absence of negligent or intentional misconduct so long as materially misleading information was provided by the fiduciary.

The question which should be decided is —

> What Standard of Proof is required to impose liability for breach of fiduciary duty under ERISA when a fiduciary undertakes to disclose information to participants in an ERISA plan?

PARTIES TO THE PROCEEDING

Petitioners Michael J. Vallone, Joyce E. Heidemann and James J. O'Keefe are retirees of the Continental Corporation which was acquired by CNA Financial Corporation a/k/a CNA Casualty of Illinois in 1996. The Petitioners were participants in Continental's Voluntary Special Retirement Program (VSRP).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE CIRCUITS OVER THE PROOF NECESSARY TO PROVE A BREACH OF FIDUCIARY DUTY CLAIM 5

I. THE SEVENTH CIRCUIT INTERPRETATION OF *VARITY* ALSO RAISES AN IMPORTANT FEDERAL QUESTION DESERVING REVIEW BY THIS COURT 9

CONCLUSION 11

APPENDIX

CIRCUIT COURT ORDER (07/15/04) 1a

DISTRICT COURT OPINION (03/28/03) 40a

DISTRICT COURT JUDGMENT (03/28/03) 48a

SECTION 404(A) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA"), 29 U.S.C., §1104(A) 49a

TABLE OF AUTHORITIES

Page

CASES

ABBRUSCATO V. EMPIRE BLUE CROSS AND BLUE SHIELD, 274 F.3D 90 (2ND CIR. 2001) 1, 7

ADAMS V. FREEDOM FORGE CORPORATION, 204 F.3D 475 (3RD CIR. 2000) 1

BEACH V. COMMONWEALTH EDISON COMPANY, 382 F.3D 656 (7TH. CIR. 2004) 10

DEVLIN V. EMPIRE BLUE CROSS AND BLUE SHIELD, 274 F.3D 76 (2ND CIR. 2001) 1

DONOVAN V. BIERWIRTH, 680 F.2D 263, 272 N.8 (2ND CIR.), CERT. DENIED, 459 U.S. 1069 (1982) 5

FIRESTONE TIRE & RUBBER CO. V. BRUCH, 489 U.S. 101 (1989) 9

FRAHM V. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, 137 F.3D 955, 959-960 (7TH CIR. 1998) 4, 7

JAMES V. PIRELLI ARMSTRONG TIRE CORPORATION, 305 F.3D 439 (6TH CIR. 2002) 1, 7

IN RE UNISYS CORP. RETIREE MEDICAL BENEFIT "ERISA" LITIGATION, 57 F.3D 1255 (3RD CIR. 1995) 1, 7, 8

VALLONE V. CNA FINANCIAL CORPORATION, ET AL., 375 F.3D 623 (7TH CIR. 2004) 1

VARITY CORP V. HOWE, 516 U.S. 489, 116 S. CT. 1065, 134 ED.2D 130 (1996) ..... *passim*

MISCELLANEOUS

28 U.S.C. § 1254(1) 2

Employment Retirement Income Seeurity Act, 29 U.S.C. §1104 ..... 2, 5, 6

Employment Retirement Income Security Act, 29 U.S.C. §1104(a)(1)(B) 2, 5, 6, 8

OTHER AUTHORITIES

Restatement (Second) of Trusts § 173 9

George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees* § 961 (Rev. 2d ed. 1983) 9

2A Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* § 173 (4th ed. 1988) 10

PETITION FOR A WRIT OF CERTIORARI

Michael Vallone, Joyce Heidemann and James J. O'Keefe petition for a writ of certiorari to this Court to review the decision and judgment in *Vallone v. CNA Financial Corporation, et al*, 375 F.3d 623 (7th Cir. 2004).

In *Varity Corp. V. Howe*, 516 U.S. 489 (1996), this Court held that ERISA fiduciaries are subject to liability if they mislead retirees concerning benefits under an ERISA plan. The Seventh Circuit has interpreted *Varity* to mean that where there is a duty to provide accurate information under ERISA, a subjective intent to deceive plan participant's is required in order to impose liability and mere negligence in failing to fulfill that duty is not actionable.

The standard adopted by the Seventh Circuit is in direct conflict with the standard of proof applied in the Second, Third and Sixth Circuits[1] and contravenes the purpose and trust principles of ERISA. Outside the Seventh Circuit, a fiduciary duty claim for failing to provide accurate information succeeds if materially misleading information is provided regardless of whether the fiduciary acted negligently or intentionally.

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[1] *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76 (2nd Cir. 2001); *Abbruscato v. Empire Blue Cross Blue Shield*, 274 F.3d 90 (2nd Cir. 001); *In Re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3rd Cir. 1995); *Adams v. Freedom Forge Corporation*, 204 F. 3d 475 (3rd Cir. 2000); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002).

This Court needs to resolve the obvious conflict which exists between Circuits over the scope of the *Varity* proof necessary to impose fiduciary liability under ERISA.

OPINIONS BELOW

The Memorandum Opinion and Order of the District Court for the Northern District of Illinois, dated March 28, 2003, is unreported and is reprinted herein at App. 40a-48a. The Opinion of the United States Court of Appeals for the Seventh Circuit, dated July 15, 2004, affirming the district court is reported at 375 F.3d 623 (7th Cir. 2004) and is reprinted herein at App. 1a-39a.

STATEMENT OF JURISDICTION

The Seventh Circuit decided and issued its opinion on July 15th, 2004. This petition is timely in that Petitioners have filed it within ninety (90) days of July 15th, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 404(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C., §1104(a). App. 49a-50a.

STATEMENT OF THE CASE

Petitioners are retired former employees of the Continental Insurance Company ("Continental"). In November 1991, Continental offered a Voluntary Special Retirement Program ("VSRP") to a select group of active employees whose years of service and age met the qualifying standard. The VSRP included a monthly health care allowance ("HCA"), a welfare benefit not normally considered a vested benefit under ERISA.

To encourage widespread acceptance of the VSRP, Continental affirmatively and systematically represented to its employees that the VSRP was a separate and distinct program from the general retirement program, and that the HCA was to be a lifetime benefit for the employees and their spouses. Eventually, 347 employees from across the country accepted the VSRP offer.

In 1995, Continental merged with CNA Financial Corporation ("CNA") and the VSRP monthly benefit continued to be paid until January 1, 1999, when CNA announced that the HCA was to be eliminated. The Petitioners and other similarly situated retirees protested the elimination orally and in writing, but CNA refused to recognize the separate and distinct rights of the VSRP class of retirees.

The Petitioners then filed a putative class action suit on behalf of themselves and the other VSRP retirees alleging that Continental and CNA deprived them of health benefits under the HCA in violation of ERISA. The Petitioners alleged contract, quasi-

contract and breach of fiduciary duty claims which were eventually disposed of by the district court through summary judgment granted in favor of the defendants.

In granting summary judgment on the Plaintiff's fiduciary duty claims, the district court concluded based upon the evidence that employees were in fact told that the HCA benefit was a lifetime benefit for them and their spouses. They were not told that these benefits could be changed (although the employees were referred to a SPD that reserved the right to change benefits under the regular retiree plan). They were not told that the benefits were irreversible, so employees therefore concluded that the benefits were irreversible, a conclusion that was material to their decision to retire. And, the intention and decision to change benefits came several years later, after CNA acquired Continental. The district court also acknowledged that the Plaintiffs had offered "persuasive case law from other circuits which have dealt with similar facts and have supported claims for breach of fiduciary duty." However, the district court held that the Plaintiff's claims were doomed by the Seventh Circuit decision in *Frahm*.

The Seventh Circuit affirmed the judgment on July 15, 2004, rejecting the Plaintiff's contention that a fiduciary duty to convey accurate information includes not misinforming employees, through material misrepresentations and incomplete, inconsistent or contradictory disclosures. Again, the Seventh Circuit conceded that the district court was correct that *Frahm* demonstrates a narrower interpretation of *Varity* than exists in other circuits ("Specifically, while there is a duty to provide accurate information under ERISA,

negligence in fulfilling that duty is not actionable."). App. 32a.

REASONS FOR GRANTING THE PETITION

THERE IS AN IRRECONCILABLE CONFLICT BETWEEN THE CIRCUITS OVER THE PROOF NECESSARY TO PROVE A BREACH OF FIDUCIARY DUTY CLAIM.

Under ERISA §404(a)(1)(B), 29 U.S.C. § 1104 (a)(1)(B), an ERISA fiduciary must conduct the plan's affairs "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." "These fiduciary duties, as Judge Henry Friendly observed, are the "Highest Known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 N.8 (2d Cir.), *cert. Denied*, 459 U.S. 1069 (1982).

This Court in *Varity Corp. V. Howe*, 516 U.S. 489 (1996), reserved the question of whether ERISA imposes a duty on fiduciaries to disclose complete and accurate information about benefits. There, Varity's management (acting in a fiduciary capacity) represented to its employees that its new subsidiary– Massey Combines– had a rosy financial future and encouraged incumbent employees to transfer to work there. The parent, it turned out, knew better: the subsidiary was thinly capitalized and built to fail as a stratagem to eradicate Varity's liabilities, including benefit obligations to its workforce. Yet, in

communications with employees, the company reported that employees' benefits would remain secure if they voluntarily transferred to the subsidiary. Fifteen hundred employees accepted the invitation to transfer and, within two years, lost their benefits when Massey Combines fell into receivership.

The Court found that Varity's statements about the safety of its employees' benefits violated the company's fiduciary duty under ERISA § 404. It based its decision not on the duty of care, but on the duty of loyalty under subsection (A) of the section 404(a)(1). *Id.* at 506-507. The Court left open for another day "the question [of] whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquires." *Id.* at 506.

Since *Varity*, the Seventh Circuit has concluded that the standard of proof needed to succeed on a fiduciary claim requires proof that the fiduciary has a subjective intent to deceive participants and beneficiaries before liability attaches. This conclusion is totally irreconcilable with decisions by the Second, Third and Sixth Circuits. As the Seventh Circuit acknowledged:

> "The Second Circuit, which has given the broadest scope to ERISA fiduciary duty claims, has held that representing to plan participants that a plan's benefits are "lifetime" when they are not vested can create a genuine issue of material fact as to whether misrepresentations were made or whether there was a failure to provide

> complete and accurate information. *Abbruscato*, 274 F.3d at 102-03. The Third Circuit has held that a fiduciary duty claim could proceed, despite the employer's reservation of the right to terminate retirement benefits, when oral and written representations were made to employees that the benefits would continue for life and the employer was aware that retirement decisions were being based on the mistaken assumption that the benefits were also vested. *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1266-67 (3d Cir. 1995). And the Sixth Circuit has held that a breach of fiduciary duty claim was made out where a company – both of its own accord and in response to specific employee inquiries – misrepresented to employees that a reservation of rights clause in the plan did not allow retirement benefits to be changed when the legal effect of the clause was precisely the opposite. *James v. Pirelli*, 305 F.3d 439, 455-56 (6th Cir. 2002). App. 29a-30a.

Despite well-reasoned opinions from the other Circuits, the Seventh Circuit has refused to depart from its holding in *Frahm* that "advice to employees stressing the availability of "lifetime" benefits without any qualifiers indicating that the employer reserved the right to change or terminate the benefits was not a breach of fiduciary duty."

Here, the evidence establishes that Continental deliberately fostered the belief that the VSRP was a separate and distinct retirement program from its regular retirement program and that the HCA was a lifetime benefit for eligible employees and their spouses. At the time these representatives were made, Continental senior management knew that the HCA benefit could be terminated under ERISA, but they intentionally fostered the belief that the HCA was a lifetime benefit when Continental management knew of its employees incorrect – and understandable – belief that the HCA benefits would continue unchanged for the duration of their retirement.

Under the controlling law in the Second, Third and Sixth Circuits, the Petitioners fiduciary claim would have survived despite reservation of rights provisions in the Continental general retirement plan because a reservation does not insulate Continental from its obligation to provide "complete and accurate information." *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.*, 57 F.3d 1255, 1266 (3rd Cir. 1995).

The legal conflict between Circuits regarding the correct standard of proof for breach of fiduciary duty claims needs to be resolved by this Court to insure that there is a single, consistent interpretation of Section 404(a)(1)(B).

I. THE SEVENTH CIRCUIT INTERPRETATION OF *VARITY* ALSO RAISES AN IMPORTANT FEDERAL QUESTION DESERVING REVIEW BY THIS COURT.

As this Court has repeatedly observed, Congress directed the courts under ERISA to look to the common law of trusts to define the fiduciary duties of persons responsible for administering a plan. *Varity Corp.*, 516 U.S. at 496 ("we recognize that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment"); *Firestone Tire & Rubber Co. V. Bruch*, 489 U.S. 101, 110 (1989) ("ERISA legislative history confirms that the Act's fiduciary responsibility provisions ... 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.

Trust principles require that when a beneficiary inquires about a trust, the fiduciary must furnish complete and accurate information. *See* Restatement (Second) of Trusts § 173 ("[t]he trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property ..."); George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees* § 961, at 4 (Rev. 2d ed. 1983) (""[i]f the beneficiary asks for relevant information about the terms of the trust, its present status, past acts of management, the intent of the trustee as to future administration, or other incidents of the administration of the trust, ... it is the duty of the trustee to give the beneficiary the information which he

has asked"); 2A Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* § 173, at 462 (4th ed. 1988) ("[t]he trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust").

The Seventh Circuit believes that *Varity* limits fiduciary duty claims to situations where there are outright lies to employees and there is an intent to deceive participants and beneficiaries about plan benefits. However, trust principles place a conscientious burden on a fiduciary to provide accurate and complete information under ERISA. The Seventh Circuit's decision in this case, and its recent opinion in *Beach v. Commonwealth Edison Company*, 382 F.3d 656 (7th. Cir. 2004), shows a pattern of refusing to recognize the proper breath and scope of this Court's decision in *Varity*, and fundamentally ignores the concept that whenever an employer exercises a fiduciary function, it must speak the whole truth. The Seventh Circuit's standard of proof eviscerates fundamental precepts of trust law and permits fiduciaries to successfully tell half truths rather than provide accurate and complete information to plan participants and beneficiaries.

The Seventh Circuit's decision is dramatically at odds with the language, history and design of ERISA and should be reversed.

CONCLUSION

Petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-2090

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL J. VALLONE, JOYCE E. HEIDEMANN and JAMES J. O'KEEFE,
Plaintiffs-Appellants,

v.

CNA FINANCIAL CORPORATION, a/k/a CNA CASUALTY OF ILLINOIS, and THE CONTINENTAL INSURANCE COMPANY,
Defendants-Appellees.

November 6, 2003, Argued
July 15, 2004, Decided

COUNSEL: For MICHAEL J. VALLONE, JOYCE E. HEIDEMAN and JAMES J. O'KEEFE, Plaintiffs - Appellants: William J. Sneckenberg, Stuart M. Brody, SNECKENBERG & ASSOCIATES, Chicago, IL USA.

For CNA FINANCIAL CORPORATION, also known as CNA CASUALTY OF ILLINOIS and CONTINENTAL INSURANCE COMPANY, Defendants - Appellees: Ronald J. Kramer, SEYFARTH SHAW, Chicago, IL USA.

JUDGES: Before CUDAHY, MANION and ROVNER, Circuit Judges.

OPINION BY: CUDAHY

OPINION: CUDAHY, *Circuit Judge.* This case involves another episode in the widespread efforts of corporations to reduce their liabilities by cutting back on retiree benefits. The law in this circuit is well-established, but this does nothing to cushion the hardship of pensioners faced with a new drain on their limited resources.

In late 1991, The Continental Insurance Company(Continental) offered an early retirement package to some of its employees as a cost containment initiative. Michael J. Vallone, Joyce E. Heidemann and James J. O'Keefe (collectively, the plaintiffs) are three of the 347 Continental employees who accepted the early retirement package (the early retirees), which included the "lifetime" welfare benefit at issue in this case, a Health Care Allowance (HCA). In 1995, Continental was acquired by CNA Financial Corporation (CNA). In 1998, CNA notified the early retirees that as of January 1, 1999, their HCA benefit would be terminated. The plaintiffs challenged this decision by complaining to the Plan Administrator of CNA's retirement plan, to no avail. They subsequently brought suit, alleging claims of wrongful denial of benefits under the Employee Retirement Income Security Act (ERISA), breach of contract, estoppel and a breach of fiduciary duty. The district court granted summary judgment to the defendants on all claims, and we now affirm.

I. Background

A. Factual and Legal Background

In November 1991, Continental offered a Voluntary Special Retirement Program (VSRP) to its employees who had 85 years of combined age and service (with minima of 55 years of age and 10 years of service). The VSRP included a monthly Health Care Allowance (HCA), a welfare benefit that was offered to all retirees. However, the HCA benefit offered as part of the VSRP differed from the HCA benefit available to regular retirees. It is the nature of this difference that is at issue here. Accompanying the VSRP were explanatory materials, some of which the plaintiffs claim expressed Continental's intent to vest the HCA benefit, and others which CNA claims did just the opposite. The potential early retirees were also told, both orally and in writing, that the HCA benefit would be a "lifetime benefit." The plaintiffs are three of the 347 Continental employees who accepted early retirement under the VSRP in early 1992. Continental was acquired by CNA in 1995.

All went smoothly until August 1998, when CNA notified the early retirees that their HCA benefit would be eliminated as of January 1, 1999. The plaintiffs complained by telephone to CNA officials and were told that the Plan Administrator's decision was appropriate and final. Believing they had no practical recourse under the administrative appeal procedures made available to them by the general retirement plan, the plaintiffs sued CNA in a purported class action on behalf of Continental employees who elected to retire under the VSRP, bringing claims of violation of §

502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) for wrongfully failing to pay benefits (Count II), breach of fiduciary duty in violation of § 404 of ERISA, 29 U.S.C. § 1104 (Count III), breach of ERISA and common law bilateral contracts (Count IV) and promissory estoppel (Count V). n1

Two other putative class members, Bernard A. Serek and Thomas L. Jones, had submitted written appeals to CNA's Plan Administrator, in which they argued that the VSRP documents created a contract or entitlement that prohibited unilateral termination of their HCA benefits. Serek and Jones received substantially the same response as did the plaintiffs. Because Serek and Jones had exhausted their administrative claims, the district court found that the plaintiffs were excused on grounds of futility from the requirement that they exhaust their own administrative claims. (Appellants' Short Appx., Memorandum Op. and Order 11/10/99 (11/10/99 Order) at 7-8.) However, because the plaintiffs had not themselves complied with the administrative review procedures, the district court was unwilling to allow them to "start from scratch in federal court." (Appellants' Short Appx., Memorandum Op. and Order 5/16/00 (5/16/00 Order) at 4.) Thus, purportedly on the basis that the evidence relevant to evaluating a Plan Administrator's discretionary decision to deny benefits is limited to those materials available to the Plan Administrator, the district court (at least initially) stayed discovery on all of the plaintiffs' claims and limited its review to the administrative record of Serek's and Jones's complaints. *Id.* at 4-5. Broader discovery was later allowed with respect to the fiduciary duty claim, though summary judgment was granted to CNA on the other three claims. (Appellants'

Short Appx., Memorandum Op. and Order 12/28/00 (12/28/00 Order) at 3 n.3, 13.) The district court eventually granted summary judgment to CNA on the fiduciary duty claim as well. (Appellants' Short Appx., Memorandum Op. and Order 3/28/03 (3/28/03 Order) at 7.)

The plaintiffs now appeal the district court's decision to limit discovery to the administrative record on three of its claims and from its grant of summary judgment on all counts. CNA appeals the district court's decision to widen the scope of discovery with respect to the plaintiffs' breach of fiduciary duty claim, though this would matter only if we were to reverse the district court's grant of summary judgment on that claim.

B. Documents and Oral Representations

The retirement package in this case involves a complicated construction of enhancements to the general retirement plan in effect at the time. Not surprisingly, the parties disagree about which documents (and oral representations) created the VSRP and its enhanced HCA benefit at issue here. Continental's general retirement plan documents--which (together with their reservations of rights clauses) CNA argues are part of the VSRP-- include the 1990 Comprehensive Health Care and Dental Plan of the Continental Corporation (1990 Plan) (R. 109-1, ex. 1),Your Benefits in 1991 (1991 General Summary Plan Description (SPD)) (R. 109-1, ex. 4), A Guide for Benefits for Employees Considering Retirement During 1991 (1991 Retirement Guide) (R. 109-1, ex. 6), A Guide for Employees Considering Retirement During 1992 (1992 Retirement Guide) (R. 109-1, ex. 7),

and Retiree Benefits in 1991 (1991 Retiree SPD) (R. 109-1, ex. 8). Additionally, between the time the plaintiffs (and other early retirees) complained about the termination of their HCA benefit and the time the Plan Administrator rendered his decision on the formal appeals of other early retirees, CNA amended the 1990 Plan and created the 1996 Continental Insurance Company Retiree Group Medical and Dental Plan (1996 Plan) (R. 109-1, ex. 3), which became effective in October 1998. Continental also supplied the early retirees with several documents at the time it solicited their participation in the VSRP. These documents (the VSRP Documents) include a covering memorandum dated November 21, 1991 (VSRP Covering Memo) (R. 109-2, ex. 9), A Brief Description of the Voluntary Special Retirement Program (Brief Description Newsletter) (R. 109-2, ex. 12), the 1992 Retirement Guide, a personalized calculation worksheet (R. 109-2, ex. 10), a payment election form (R. 109-2, ex. 11), an acceptance/rejection form (R. 109-2, ex. 13) and a retiree benefit elections form (R. 109-2, ex. 14).

Continental is also alleged to have made oral representations to the potential early retirees regarding the nature of the HCA benefit. During group and individual meetings that took place in late 1991 between Continental's human resources representatives and eligible employees in various locations around the country, the HCA was consistently described as a "lifetime" benefit. n2 Heidemann, who was an assistant vice president of human resources for the Great Lakes region and an officer of the company at the time of her retirement, testified at deposition that she had been told by her superiors in human resources that the HCA benefit was a "lifetime" benefit. (R. 118-2,

tab 1, Heidemann dep. at 145, 164.) She could not recall anyone ever telling her that the VSRP benefits were irrevocable. *Id.* at 147. She strongly believed the VSRP was separate and distinct from the general retirement plan, and since no one in human resources ever told her the benefits *could* be revoked, *id.*, and none of the documents specifically discussing the VSRP contained a disclaimer, *id.* at 163, 218-19, she assumed that the "lifetime" benefits were irrevocable. When Heidemann presented the VSRP to the eligible employees in her region (including Vallone), she represented the benefits as being for "your lifetime" but did not say anything about their irrevocability. (R. 118-2, tab 2, Vallone dep. at 77-79, 82.)

The district court, from the perspective of the evidence most favorable to the plaintiffs, determined that eligible employees were told that the benefits were for their own and their spouses' lifetimes; that they were not told the benefits could be changed or revoked (although they were referred to documents that reserved those rights); that they were not told the "lifetime" benefits were irrevocable, but they nevertheless concluded that the benefits were irrevocable for reasons similar to Heidemann's reasons; that this conclusion was material to their decision to retire; that Continental had no intention at the time of the plaintiffs' retirement of altering the HCA benefit; and that the intention and decision to change benefits came several years later, after Continental had been acquired by CNA. (3/28/03 Order at 6.) We find that these factual determinations are reasonable and are supported by the record, but we would add that although Continental may not have had any intention of terminating the early retirees' benefits, it did know

that under ERISA its plan documents allowed it to do so.

II. Discovery Issues

The district court initially stayed discovery with respect to all of the plaintiffs' claims, limiting its review to only those materials considered by the Plan Administrator at the time he denied Serek's and Jones's written claims for benefits. (5/16/00 Order at 4.) The record could, however, be augmented (upon motion of the plaintiffs) by any written materials germane to the interpretation of the VSRP and the Plan that were not contained in the administrative record. *Id.* at 4-5. The plaintiffs never made such a motion. Later, the district court allowed the plaintiffs to pursue expanded discovery on their fiduciary duty claim. (12/28/00 Order at 3 n.3.) Of course, neither party is content with the district court's handling of discovery, which just proves the truth of the old saw: if you try to please everybody, you end up pleasing nobody.

We review a district court's decisions on discovery matters for abuse of discretion. Searls v. Glasser, 64 F.3d 1061, 1068 (7th Cir. 1995). A court does not abuse its discretion "unless one or more of the following circumstances is present: (1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary." Sherrod v. Lingle, 223 F.3d 605, 610 (7th Cir. 2000), quoting Gile v. United Airlines, 95 F.3d 492, 495 (7th Cir. 1996). Moreover, "we will not reverse the court's decision absent a clear showing that

the denial of discovery resulted in actual and substantial prejudice to the complaining litigant." Searls, 64 F.3d at 1068.

The standard of review of a Plan Administrator's decisions regarding benefits depends on whether the Plan Administrator was given the discretion to make those decisions. *See* Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan, 195 F.3d 975, 980 (7th Cir. 1999) ("Decisions of ERISA plan administrators presumptively receive *de novo* review, but if the plan establishes discretionary authority then review will be deferential.") (citations omitted). As we explain in more detail below, CNA's Plan Administrator had sufficient discretion that our review of his decision to deny benefits on the basis that there was no contract vesting benefits must be deferential. And "deferential review of an administrative decision means review on the administrative record." Id. at 981-82. Thus, with respect to the early retirees' claims for wrongful denial of benefits and breach of ERISA and common law contract, the district court correctly limited discovery to the complete administrative record since the Plan Administrator's decision to deny benefits was based on a determination that the HCA benefits could be terminated or altered because they were not vested (i.e., because no contract existed that vested the plaintiffs' HCA benefits).

However, the plaintiffs' estoppel claim, which the district court limited to the same record for the same reason, is not actually an appeal of a decision of the Plan Administrator. An estoppel claim requires (among other things) a knowing misrepresentation--generally in writing-- here alleged to be Continental's

representation to the potential early retirees that the HCA benefits would be vested when Continental knew they could be terminated or modified. In reviewing Serek's and Jones's appeals, the Plan Administrator did not make any finding whether the equities of the situation required CNA to honor any non-legally-binding representations it may have made that the benefits were vested. Thus, since the estoppel claim is not a review of a decision of the Plan Administrator, the district court erred in limiting discovery to the administrative record with respect to the estoppel claim.

Notwithstanding the district court's error, its decision to limit the record with respect to the plaintiffs' estoppel claim is harmless, because the plaintiffs never asserted or demonstrated prejudice. Even after being allowed additional discovery on their fiduciary duty claim, the plaintiffs have pointed to nothing--oral or written--that the district court's limitation prevented it from considering. Rather, the plaintiffs argue, citing Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993) (en banc), that unspecified "extrinsic evidence" should have been allowed to "explain what was intended under the VSRP and what was promised to the [early retirees] as an inducement to retire." (Appellants' Br. at 25.) The district court, which ultimately found that oral representations were irrelevant to the plaintiffs' estoppel claim because the documents were not ambiguous, specifically allowed the plaintiffs to move to augment the administrative record with any "written materials germane to the interpretation of the VSRP and the Plan" which they learned of that were not already included. (5/16/00 Order at 4-5.) The plaintiffs never made any such a

motion. Since the plaintiffs do not tell us what "extrinsic evidence" the district court failed to consider due to limitations on the record, and since the district court seems to have considered all relevant evidence in the entire record (all written documents purporting to relate to the VSRP and/or the general retirement plan, as well as Continental's oral and written representations that the HCA benefits were "lifetime"), the plaintiffs fail to demonstrate any prejudice, even after being invited to do so by CNA in its brief.

From another direction, CNA challenges the district court's decision to *expand* the record with respect to the fiduciary duty claim (12/28/00 Order at 3 n.3), even though the district court eventually granted summary judgment in its favor in the face of the augmented record. CNA argues that the district court erred in permitting the plaintiffs to take discovery beyond the record with respect to their fiduciary duty claim, and that the Plan Administrator's discretion requires that review be limited to the administrative record as it was for the other claims. However, the breach of fiduciary duty is alleged to have occurred when oral misrepresentations were made to the potential early retirees at the time they were considering whether to take the VSRP package and, as such, their claim does not involve a decision of the Plan Administrator. For that reason, there was no need to limit review of the fiduciary duty claim to the administrative record, and the district court did not abuse its discretion to allow additional discovery. n3

III. Substantive Issues

On December 28, 2000, the district court granted CNA's motion for summary judgment on the plaintiffs' claims of wrongful denial of benefits under ERISA (Count II), breach of ERISA and common law contract (Count IV) and equitable estoppel (Count V). On March 28, 2003, the district court granted CNA's motion for summary judgment on the plaintiffs' one remaining count, their breach of fiduciary duty claim (Count III). We review the district court's grants of summary judgment de novo. Hrobowski v. Worthington Steel Co., 358 F.3d 473, 475 (7th Cir. 2004). To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. Rule 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In making this determination, "we draw all reasonable inferences from the evidence in the light most favorable to the nonmoving party." Williamson v. Ind. Univ., 345 F.3d 459, 462 (7th Cir. 2003).

A. ERISA Violation for Failure to Pay Benefits (Count II)

1. Standard of review applicable to Plan Administrator's decisions

First, we must determine the appropriate standard for reviewing the decisions of the Plan Administrator. Ordinarily, "[a] denial of benefits will be reviewed de novo 'unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the

plan.' " Militello v. Cent. States, Southeast & Southwest Areas Pension Fund, 360 F.3d 681, 685 (7th Cir. 2004) (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989)). If the plan's language "indicates with the requisite if minimum clarity that a discretionary determination is envisaged," Herzberger v. Standard Ins. Co., 205 F.3d 327, 331 (7th Cir. 2000), "then a denial of benefits will be reviewed under an arbitrary and capricious standard." Militello, 360 F.3d at 685 (citing Hess v. Hartford Life & Accident Ins. Co., 274 F.3d 456, 461 (7th Cir. 2001)).

The district court neatly sidestepped the question whether the provisions of the 1990 Plan or the provisions of the 1996 Plan were in effect at the time the benefits were denied. It did so by finding that the language in the 1990 Plan "indicates with sufficient clarity that the Plan Administrator has the discretionary authority to interpret the Plan" and that, if anything, the 1996 Plan (which was adopted between the time the plaintiffs complained about the termination of the HCA benefit and the time the Plan Administrator responded to those complaints) "confers discretionary authority on the Plan Administrator even more clearly." (12/28/00 Order at 5 & n.5.) Thus, under either Plan, the arbitrary and capricious standard applies. We agree that it is unnecessary to determine which of the two Plans controls, because in addition to the district court's correct determination that the 1990 Plan conferred sufficient discretion on the Plan Administrator and that the 1996 Plan expanded it, the fact is that it doesn't matter which Plan controls or which standard of review is applicable. For the ultimate issue is whether the benefits were vested. If the benefits were vested, the denial of benefits would be

wrongful even under an arbitrary and capricious standard; and if the benefits weren't vested, the denial of benefits would be lawful even under a de novo standard. We now proceed to the merits.

2. Analysis

As they argued in the district court, the plaintiffs maintain that under the VSRP, which they believe was separate and distinct from the general retirement plan, they received a vested "lifetime" HCA benefit, and the Plan Administrator therefore violated ERISA when he terminated their HCA benefit. The district court rejected this argument by noting that employers are free to amend or terminate welfare benefits, which do not vest absent a showing of clear intent to vest in written plan documents. The VSRP was a modification of the general retirement plan (and the 1992 Retirement Guide was specifically incorporated into the VSRP). Hence, the reservation of rights clauses in the general retirement plan documents became part of the VSRP. The district court further found that the Brief Description Newsletter, which described the VSRP's enhanced benefits, did not create an ambiguity because the plaintiffs' interpretation of language in the Newsletter as vesting the HCA benefit (i.e., guaranteeing that the HCA benefit amount would never be reduced) was not reasonable.

We start from the premise that "employers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78, 131 L. Ed. 2d 94, 115 S. Ct. 1223 (1995). For this reason, if ERISA welfare benefits "vest at all, they do so under

the terms of a particular contract." Pabst Brewing Co. v. Corrao, 161 F.3d 434, 439 (7th Cir. 1998). The Supreme Court, followed by several courts of appeals, has indicated that a modification that purports to vest welfare benefits must be contained in the plan documents and must be stated in clear and express language. *See* Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 515, 137 L. Ed. 2d 763, 117 S. Ct. 1513 (1997); Frahm v. Equitable Life Assurance Soc'y, 137 F.3d 955, 958 (7th Cir. 1998) (citing Sprague v. General Motors Corp., 133 F.3d 388, 400 (6th Cir. 1988)(en banc) as sensibly extending the requirement of a writing to all long-term commitments); Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851, 855-56 (4th Cir. 1994); Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir. 1993). Given our presumption against the vesting of welfare benefits, silence indicates that welfare benefits are not vested. *See* Rossetto v. Pabst Brewing Co., 217 F.3d 539, 544 (7th Cir. 2000) ("Our presumption against vesting, it is important to emphasize, kicks in only if all the court has to go on is silence."). Moreover, although ERISA itself "leftopen . . . the possibility that a written plan may be combined with an oral promise, such as an undertaking to give a worker twice the benefits so established," wholly oral promises cannot be used to require the employer to provide irrevocable benefits. Frahm, 137 F.3d at 958. If there is some ambiguity in the language of the written agreement that is not disambiguated elsewhere in the document, only then may we consider evidence of the parties' intent that is "extrinsic" to the written documents, such as oral representations. *See* Rossetto, 217 F.3d at 547; Bidlack, 993 F.2d at 609.

a. The "lifetime" nature of the HCA benefit

The plaintiffs claim that all of the VSRP's enhanced benefits were vested, including the HCA, and that the HCA cannot be "carved out" of the VSRP package of vested retirement benefits. This contention is easily disposed of since the HCA benefit differs qualitatively from the VSRP's other enhanced benefits: it is a welfare benefit, as the plaintiffs concede (Appellants' Br. at 22-23), not a pension benefit. Thus, absent language expressly indicating that the HCA benefit is vested, it would not vest upon retirement. n4

The plaintiffs argue that the VSRP documents indicate that the HCA is a "lifetime" benefit, and that this had been confirmed in oral representations made to them. Specifically, they assert that the personalized calculation worksheet, which states that eligible employees will receive an HCA allowance of $ 465 per month to age 65 and $ 180 per month thereafter, indicates that this benefit is "for life." (R.109-2, ex. 10.) The payment election form, which prescribes the same HCA allowance amounts as appear on the personalized calculation worksheet and which allows eligible employees to choose to have their surviving spouses receive the HCA benefit after their death, is also offered for the implication that the benefits were for life (and even beyond). (R. 109-2, ex. 11.)

That the HCA benefit was a "lifetime" benefit--both for regular retirees and for retirees who accepted the VSRP package--is actually conceded by CNA. (Appellees' Br. at 27; 1992 Retirement Guide at 6.) The problem for the plaintiffs is that "lifetime" may be construed as "good for life unless revoked or modified."

This construction is particularly plausible if the contract documents include a reservation of rights clause (which, as will be shown, is the case here). *See* UAW v. Rockford Powertrain, Inc., 350 F.3d 698, 704 (7th Cir. 2003) ("We must resolve the tension between the lifetime benefits clause, and the plan termination and reservation of rights clauses, by giving meaning to all of them. Reading the document in its entirety, the clauses explain that although the plan in its current iteration entitles retirees to health coverage for the duration of their lives and the lives of their eligible surviving spouses, the terms of the plan--including the plan's continued existence--are subject to change at the will of [the employer]. The health insurance section of the plan description unambiguously does not provide the plaintiffs with vested lifetime health insurance benefits.") (internal citations omitted); Diehl v. Twin Disc, 102 F.3d 301, 307 (7th Cir. 1996) ("When potentially conflicting provisions coexist . . . within a single contract formed of several documents, the rule that contractual provisions be read as parts of an integrated whole will lead a court to seek an interpretation that reconciles those provisions."); *see also In re Unisys Corp. Retiree Med. Benefit "ERISA"* Litig., 58 F.3d 896, 904 (3d Cir. 1995) ("An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits provided the plan continues to exist."); Chiles v. Ceridian Corp., 95 F.3d 1505, 1512 n.2 (10th Cir. 1996) ("The weight of case authority supports the *Unisys* approach, that a reservation of rights clause allows the employer to retroactively change the medical benefits of retired

participants, even in the face of clear language promising company-paid lifetime benefits."). As laypersons, the plaintiffs' confusion on this issue is understandable; it is also very unfortunate, if it was a basis for their accepting the VSRP package. But in the perhaps beady eyes of the law, the "lifetime" nature of a welfare benefit does not operate to vest that benefit if the employer reserved the right to amend or terminate the benefit, given "what it takes to overcome the presumption that welfare benefits do not vest, combined with [our] reluctance to interpret a contract as being at war with itself." Diehl, 102 F.3d at 307.

It is true that some of our decisions have indicated that the use of "lifetime" to denote the duration of benefits may create an ambiguity and is not tantamount to silence (with its presumption against vesting). *See* id. at 306 (finding that separate agreement containing entitlement to lifetime benefits modified reservation of rights clause incorporated from another agreement and entitled retirees to welfare benefits for their lifetime); Bidlack, 993 F.2d at 608 ("But the agreements are not silent on the issue; they are merely vague. They say that once retired employees reach the age of 65 the company will pick up the full tab for their health insurance and that when they die their spouses will continue to receive supplemental health benefits, again at the company's cost. This could be thought a promise to retired employees that they and their spouses will be covered for the rest of their lives."). However, none of those decisions involve situations where a reservation of rights clause is an integral part of the contract that provides the "lifetime" benefits. In *Diehl*, we found that the contract providing "lifetime" benefits "was an independent contract, supported by separate

consideration and capable of modifying or supplanting prior contractual arrangements," such as the one that contained the reservation of rights clause. Diehl, 102 F.3d at 306-07. Here, the nature of the HCA as a "lifetime" benefit is not one of the enhancements created by the VSRP because the HCA is also a "lifetime" benefit for regular retirees according to the general retirement plan documents. Thus, unlike Diehl, the "lifetime" nature of the HCA benefit could not abrogate the reservation of rights clause included in the 1992 Retirement Guide and other general retirement plan documents because both were offered by the same contract. Moreover, the reservation of rights clause in *Diehl* provided an "unsure foundation of the putative right to discontinue" benefits. Id. at 308. The use of "lifetime" with respect to the VSRP's HCA benefit simply does not operate to vest that benefit for the early retirees. In *Bidlack*, the only reservation of rights clause applicable to the plan at issue was in a contract between the employer and an insurance company for the purchase by the former of health insurance sold by the latter. Bidlack, 993 F.2d at 606. We specifically found that clause inapplicable to the contract between the employees and the employer as to duration of benefits, the main issue in that case. *Id.* Thus, *Bidlack* did not involve the situation here where "lifetime" benefits were granted by the employer while the right to terminate or modify them was reserved. We have held that, when "lifetime" benefits are granted by the same contract that reserves the right to change or terminate benefits, the "lifetime" benefits are not vested. *See* Rockford Powertrain, 350 F.3d at 704.

The plaintiffs additionally argue that the Brief Description Newsletter's heading, "No reductions in

the Retiree Health Care Allowance" indicated that the HCA benefit levels could not be altered. (Brief Description Newsletter at 2.) However, the paragraph accompanying that heading shows that no such promise was made. The paragraph reads:The maximum Retiree Health Care Allowance is earned at age 62 after 25 years of service as an active employee. If you retire under the Voluntary Special Retirement Program, you will be credited with the maximum Retiree Health Care Allowance, even if you have less than 25 years of service or are under age 62." n5 *Id.*

With respect to the plaintiffs' contention here, we agree with the district court that the "plaintiffs' interpretation of the provision is not the most sensible one." (12/28/00 Order at 8-9.) In context, the heading in the Brief Description Newsletter refers to and rejects the reduced benefit amounts that would otherwise apply if an employee who does not meet the age and service requirements retires under the general retirement plan. n6 Thus, the VSRP's enhancement to the regular retirement plan's HCA benefit was to ensure that the early retirees qualified for the maximum HCA amounts; it was not, and could not reasonably have been construed as, a promise to vest the HCA benefit at that maximum level for the remainder of the early retirees' lives. The plaintiffs' insistence to the contrary is unsupportable.

b. Reservations of rights clauses

The plaintiffs next argue that, as a separate and distinct program, the benefits in the VSRP were not subject to the reservations of rights clauses in the various general retirement plan documents, and that

the documents specifically mentioning the VSRP did not contain reservation of rights clauses. However, regardless of how the plaintiffs believe the VSRP was marketed to the early retirees, their initial premise that the VSRP was separate and distinct from the general retirement plan is incorrect. This is evident from a review of the Brief Description Newsletter, which repeatedly refers to the general retirement plan in discussing the VSRP's enhanced benefits, making clear that the general retirement plan is the baseline program to which the VSRP's enhancements would be made. n7 The plaintiffs themselves admit that the VSRP was a modification of the regular retirement plan. (Appellants' Br. at 32.) We also note that if the plaintiffs were correct that the VSRP was comprised only of those documents that specifically mentioned the VSRP, it would lack such fundamental prerequisites as administrative procedures and descriptions of the very benefits being offered.

Moreover, the Covering Memo specifically incorporated the 1992 Retirement Guide and its reservation of rights clause. The Covering Memo stated that "retirement means a major change in lifestyle for most people, and you'll need to weigh the pros and cons carefully. The enclosed materials are intended to help you arrive at the right decision for you." (Covering Memo at 1.) One of the enclosed documents was the 1992 Retirement Guide, which eligible employees were told "provides information about the benefits available to you during retirement and highlights the decisions you need to make regarding those benefits." *Id.* Continental thus unambiguously stated in writing that the 1992 Retirement Guide, which included a reservation of rights clause, was part of the VSRP program and

contained information about retirement benefits under the VSRP, including Continental's reserved right to alter or terminate those benefits. The reservation of rights clause appears in a box near the bottom of the last page of the 15-page document: "The coverages described in this Guide may be amended, revoked or suspended at the Company's discretion at any time, even after your retirement. No management representative has the authority to change, alter or amend these coverages." n8 (1992 Retirement Guide at 15.) Although the plaintiffs argue that this reservation of rights clause on its face applies to "the coverages described in this Guide" and that the VSRP was not mentioned in the 1992 Retirement Guide, we noted earlier that the "lifetime" nature of the HCA benefit *was* set out in the 1992 Retirement Guide and that the HCA benefit's "lifetime" nature was not one of the VSRP's enhancements.

Although the 1992 Retirement Guide (with its applicable reservation of rights clause) was part of the VSRP, along with, as will be shown, the 1990 Plan and the annual SPDs available at the time the VSRP was offered, it is worth addressing CNA's argument that the lack of any reservations of rights clauses in the documents that mention the VSRP amounts to silence (with its presumption against vesting). If the benefits were not "*lifetime*" benefits, CNA would be correct. But, as we noted in *Rossetto v. Pabst Brewing Co.*, "if there is language in the agreement to suggest a grant of lifetime benefits, and the suggestion is not negated by the agreement read as a whole, the plaintiff is entitled to a trial." Rossetto, 217 F.3d at 547; *see also* Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90, 98 (2d Cir. 2001) (vacating district court's grant

of summary judgement in plan's favor because "lifetime" life insurance benefits in early retirement plans "are ambiguous and susceptible to interpretation as a promise of vested benefits" where neither of the early retirement plans "contain unambiguous reservation of rights clauses"); Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 85 (2d Cir. 2001) (where no reservation of rights clause was present, "such 'lifetime' language, we believe, is sufficient to create a triable issue of fact as to whether Empire promised to vest retiree life insurance benefits at the stated level."). Thus, if the plaintiffs had been correct that the reservation of rights clauses in the general retirement plan documents did not apply to the VSRP, the grant of "lifetime" benefits would have created an ambiguity allowing them a trial and allowing us to examine extrinsic evidence of the parties' intent. However, since we determined that this was not the case, there is no ambiguity requiring an examination of extrinsic evidence. *See* Rockford Powertrain, 350 F.3d at 704 ("The health insurance section of the plan description unambiguously does not provide the plaintiffs with vested lifetime health insurance benefits. Therefore, we need not resort to extrinsic evidence to interpret the contractual obligation between the parties.").

Finally, the plaintiffs argue that language in the 1990 Plan authorized the vesting of their retirement benefits in such a way that the reservation of rights clause in the 1990 Plan, which they concede was "the controlling document in existence at the time that the putative class elected to accept the VSRP plan" (Appellants' Br. at 23), allowed the benefits to be changed or terminated only *prior* to their retirement. n9 For this proposition,

the plaintiffs seize upon the following language: "However, no such amendment or termination shall diminish or eliminate any claim for a benefit under the Plan to which a participant shall have become entitled prior to such amendment or termination, as applicable." (1990 Plan § 8.1, at 30.) But this argument presumes the very things the plaintiffs are trying to prove: that upon their retirement, the early retirees became entitled to their retirement benefits, which could not be diminished or eliminated by later amendments. As we have already explained, welfare benefits, unlike pension benefits, do not vest upon retirement. And the reservation of rights clauses contained in the 1992 Retirement Guide and other general retirement plan documents, which were applicable to the VSRP, allow amendment or modification of retirement benefits even after retirement. Thus, there was no entitlement to the HCA benefit on a going-forward basis. *See* Hackett v. Xerox Corp., 315 F.3d 771, 774 (7th Cir. 2003) (analyzing language in a benefits plan similar to the language here and holding that "rights to benefits do not accrue prospectively"). The language at issue here prevented CNA from amending its retirement plan to require retirees to pay back HCA allowances already paid out, or retroactively terminating coverage for a claim to medical benefits to avoid paying such a claim. The reservations of rights clauses, on the other hand, allow CNA to *prospectively* alter or amend its welfare benefits offered to retirees, even after retirement, and that is what it did.

B. Breach of ERISA and Common Law (Bilateral) Contract (Count IV)

The district court unsurprisingly had difficulty distinguishing this purported contract claim from the plaintiffs' claim that they were wrongfully denied ERISA benefits. n10 As with denial of benefits claims, claims that a contract vested retirement benefits require that the vesting be done in writing, not orally. *See* Frahm, 137 F.3d at 958 ("Although . . . a written plan may be combined with an oral promise, such as an undertaking to give a worker twice the benefits so established--the utility of reducing retirement promises to writing and avoiding arguments about who said what to whom are so fundamental to both ERISA and contract law that an extension of the writing requirement to all long-term commitments is an inescapable ingredient of the federal common law slowly accumulating in ERISA's shadow."). As we have noted, the HCA benefit at issue was not vested in writing, so no bilateral contract was created that vested the HCA benefit.

Although we need not discuss CNA's argument that the plaintiffs' bilateral contract claim is duplicative of its denial of benefits claim under ERISA, we note that claims by a beneficiary for wrongful denial of benefits (no matter how they are styled) have been held by the Supreme Court to "fall[ ] directly under § 502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 62-63, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987). Recent decisions of both this circuit and the Supreme Court have held that state law claims, such as the plaintiffs' breach of common law

contract claim here, are pre-empted by ERISA. *See* Aetna Health Inc. v. Davila, 159 L. Ed. 2d 312, 124 S. Ct. 2488, 2004 WL 1373230, at *10 (U.S. June 21, 2004)("Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim."); Klassy v. Physicians Plus Ins. Co., 371 F.3d 952, 2004 U.S. App. LEXIS 11689, 2004 WL 1326717, at *4 (7th Cir. June 15, 2004) ("ERISA provides a remedy for plan participants wrongfully denied benefits. However, such claims must be brought under ERISA and creatively pleading a denial of benefits claim as a state law claim does not defeat the broad preemptive force of ERISA."). Thus, even if we had found that a written agreement vested the HCA benefit, the breach of common law contract claim would be pre-empted by ERISA § 502(a), while the breach of ERISA contract claim is duplicative of Count II, as is evident from the plaintiffs' briefs on appeal. It is appropriate to disallow a breach of common law contract claim here because plaintiffs should not be allowed to bring a denial of ERISA benefits claim in the guise of a common law breach of contract, thereby ensuring de novo review and no limitations on the record even if (as here) the plan administrator had the discretion to determine that no contract vested benefits and that benefits could therefore legally be terminated.

C. Estoppel (Count V)

In order to prevail on an estoppel claim under ERISA, we ordinarily require that plaintiffs show (1) a knowing misrepresentation; (2) that was made in writing; (3) with reasonable reliance on that misrepresentation by them; (4) to their detriment. *See* Coker v. TWA, 165 F.3d 579 (7th Cir. 1999). However, we have found an exception when plan documents are ambiguous or misleading, in which case oral representations as to the meaning of the documents may be relevant. *See* Bowerman v. Wal-Mart Stores, 226 F.3d 574, 588 (7th Cir. 2000). The district court found that exception inapplicable here--a finding that is not contested by the plaintiffs--and decided the issue on the basis that the plaintiffs unreasonably relied on the representation that the HCA benefit was a "lifetime" benefit as meaning that it was also a vested benefit. Their reliance was unreasonable given that the general retirement plan documents, to which the plaintiffs were referred, contained "numerous, unambiguous provisions reserving CNA's right to amend, suspend, or terminate the health care subsidy." (12/28/00 Order at 13.) As a guideline for the boundaries of ERISA estoppel, we have emphasized the "narrow scope" of estoppel claims and have noted that "only extreme circumstances" justify such claims. Sandstrom v. Cultor Food Science, 214 F.3d 795, 797 (7th Cir. 2000); Coker, 165 F.3d at 585.

In their brief on appeal, the plaintiffs argue that there is a material question of fact whether a promise made to them in writing that their HCA benefit would not be terminated, referring specifically to the heading in the Brief Description Newsletter stating that there would be no reduction in the HCA benefit. But this estoppel

claim fails for two reasons. First, the plaintiffs have not shown a knowing misrepresentation of fact. Although "representations about plans and intentions could be false if, at the time the statements were made, the speaker actually had a different intention," Frahm, 137 F.3d at 961, the district court found that, at the time the VSRP was offered, Continental had no intention of terminating the "lifetime" HCA benefit. Moreover, the plaintiffs have pointed to no false statements about whether the HCA benefit could be terminated, and the district court's uncontested finding that the early retirees were not told explicitly that the "lifetime" benefits were irrevocable is therefore dispositive. The fact that the benefits were "lifetime" was not a misrepresentation; as we have discussed, the plaintiffs' confusion stems from their erroneous (though understandable) equation of "lifetime" with "vested."

Second, the plaintiffs cannot show reasonable reliance. We agree with the district court that, even if there were material written misrepresentations as to the nature of the HCA benefit, the plaintiffs unreasonably ignored the reservations of rights clauses in the general retirement plan documents that put them on notice that the HCA benefit could be terminated or modified. The plaintiffs argue that "all of the benefits were packaged in a single plan," which justified their reliance on the alleged representation that "the VSRP and all of its entitlements would not be terminated." (Appellants' Br. at 38.) However, not only were no representations made that benefits would not be terminated or altered, but, as we explained earlier, the packaging of a welfare benefit (such as the HCA) with pension benefits does not by itself make the welfare benefit a vested benefit.

D. Breach of ERISA Fiduciary Duty (Count III)

ERISA requires a trustee or other fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). In interpreting this statute, the Supreme Court has held that an employer breaches its fiduciary obligation by lying to employees in order to induce them to surrender their benefits. Varity Corp. v. Howe, 516 U.S. 489, 506, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996). The plaintiffs point us to decisions from the Second, Third and Sixth Circuits which have supported claims for breach of fiduciary duty on similar facts. The Second Circuit, which has given the broadest scope to ERISA fiduciary duty claims, has held that representing to plan participants that a plan's benefits are "lifetime" when they are not vested can create a genuine issue of material fact as to whether misrepresentations were made or whether there was a failure to provide complete and accurate information. Abbruscato, 274 F.3d at 102-03. The Third Circuit has held that a fiduciary duty claim could proceed, despite the employer's reservation of the right to terminate retirement benefits, when oral and written representations were made to employees that the benefits would continue for life and the employer was aware that retirement decisions were being based on the mistaken assumption that the benefits were also vested. In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 57 F.3d 1255, 1266-67 (3d Cir. 1995). And the Sixth Circuit has held that a breach of fiduciary duty claim was made out where a company--both of its own accord and in response to specific employee inquiries--misrepresented to employees that a reservation of rights clause in the plan did not allow

retirement benefits to be changed when the legal effect of the clause was precisely the opposite. James v. Pirelli, 305 F.3d 439, 455-56 (6th Cir. 2002).

In this circuit, a breach of fiduciary duty exists if fiduciaries "mislead plan participants or misrepresent the terms or administration of a plan." Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993), *quoted in* Bowerman, 226 F.3d at 590. "Although not every error in communicating information regarding a plan will be found to violate a fiduciary's duty under ERISA, we have made clear that fiduciaries must communicate material facts affecting the interests of plan participants or beneficiaries and that this duty to communicate exists when a participant or beneficiary 'asks fiduciaries for information, and even when he or she does not.' " Bowerman, 226 F.3d at 590 (citations omitted). However, in *Frahm*, we found that advice to employees stressing the availability of "lifetime" benefits without any qualifiers indicating that the employer reserved the right to change or terminate the benefits was not a breach of fiduciary duty. Frahm, 137 F.3d at 959. As we noted in *Frahm*:Some readers must have mentally added the word "unreduced" after a word such as "lifetime." Yet unless § 1104(a)(1) is a guarantor of accurate information at all times and for the indefinite future--unless it creates not only a duty of care, but also a duty of prevision--then claims that one or another bit of advice was misleading do not violate this statute.Id. at 959-60. We also found in *Frahm* that "the district court's finding that [the employer] did not set out to deceive or disadvantage plan participants therefore forecloses plaintiffs' claim under § 1104(a)(1)." Id. at 960.

Although the plaintiffs attempt to distinguish Frahm, the bases upon which they draw distinctions are irrelevant. The plaintiffs assert that *Frahm* did not involve a claimed ambiguity in the documents, but rather, conflicting evidence about what representations were made to plaintiffs. But the need to address the claimed ambiguity does not detract from the relevance to the plaintiffs' situation of *Frahm*'s legal conclusions, and the plaintiffs don't explain why *Frahm*'s legal conclusions are irrelevant. The plaintiffs also assert that, contrary to the district court's finding, there *was* a "campaign of disinformation" here as in *Varity*. If this were correct, that would indeed serve to distinguish *Frahm*, but there is no evidence of any intent to purposefully mislead employees. Rather, our conclusion that Continental fulfilled its duty of loyalty with respect to the potential early retirees is supported by the district court's finding that at the time the VSRP was offered, Continental had no intention of eliminating the "lifetime" HCA benefit in the future. The plaintiffs characterize Continental's failure to explain, expressly and clearly, that the HCA benefit could be altered or terminated--just like the other welfare benefits offered to all retiring Continental employees--as "an intentional failure to warn VSRP participants" that Continental or a future merger partner could terminate the HCA at any time (Appellants' Br. at 34), and, even more egregiously, as "a concerted effort by CNA to remain silent about the HCA termination potential, in order to achieve its goals of maximizing retirements" (Appellants'Br. at 36). But just because Continental wanted as many of its eligible employees as possible to accept the VSRP does not mean that it purposefully violated its duty of loyalty by failing to provide an explicit warning when the necessary information was

already in the early retirees' hands. If anything, the failure to provide an explicit warning is just as easily explainable by non-actionable negligence as by a disloyal intent, and in that sense, *Frahm* is on all fours. *See* Frahm, 137 F.3d at 959 ("Slipups in managing any complex enterprise are inevitable, and negligence--a violation of the duty of care-- is not actionable."). In this respect, it is significant that the reduction of retiree welfare benefits in the face of rising health care costs is generally a relatively recent development, and warning of that possibility only recently became important. *Cf.* Bidlack, 993 F.2d at 613-14 & n.3 (Cudahy, J., concurring) (noting that the idea that retiree health benefits could be granted on anything less than a "lifetime" basis was a fairly recent development and that a presumption that silence indicated vesting was probably more in keeping with the parties' expectations at the time the agreement at issue was made).

The district court was correct that *Frahm* demonstrates a narrower interpretation of *Varity* than exists in other circuits. Specifically, while there is a duty to provide accurate information under ERISA, negligence in fulfilling that duty is not actionable. *See* Frahm, 137 F.3d at 959. That is why the employer must have set out to disadvantage or deceive its employees, as in *Varity*, in order for a breach of fiduciary duty to be made out. *See* id. at 960. Here, there is no evidence that Continental purposefully intended to confuse plan participants by "packaging the HCA with pension incentives" when "they knew that welfare benefits can be terminated, yet they never warned the retirees." (Appellants' Br. at 35.) For one thing, Continental's general retirement plan also "packaged" pension benefits with welfare benefits. We believe that this is a

common practice, and we cannot find that it evinces an intent to confuse or deceive on Continental's part. For another, as we have already noted, the mere fact that pension and welfare benefits are part of the same retirement package does not mean, up to this point at least, that employers are required to warn employees that the welfare benefits, unlike the pension benefits, are terminable. As we have repeatedly held, silence indicates that welfare benefits are not vested, *see* Rossetto, 217 F.3d at 544, and we have not limited these holdings to retirement plans containing only welfare benefits. Thus, the lack of a specific warning that welfare benefits are terminable would not alone create a breach of fiduciary duty. There is simply no evidence that Continental set out to deceive its employees by its actions, and the district court therefore correctly found that the plaintiffs' claimed breach of fiduciary duty fails under Frahm.

In fact, it is not even clear that the information provided was inaccurate. As we found earlier, the general retirement plan documents containing reservation of rights clauses were made part of the VSRP by the documents setting out the VSRP's enhancements. There was no evidence that any employee ever specifically asked about the irrevocability of the HCA benefit, that Continental falsely indicated to any employee that the HCA benefit was irrevocable or that Continental was aware that the early retirees were coming to the mistaken conclusion that "lifetime" equated to "vested." And in this circuit, if accurate written information is provided, as it was here, then the plaintiffs are unfortunately out of luck. *See* Kamler v. H/N Telcom. Servs., 305 F.3d 672, 682 (7th Cir. 2002), *cert. denied*, 538 U.S. 946, 2003 U.S.

LEXIS 2536, 155 L. Ed. 2d 487 (U.S. Mar. 31, 2003); Librizzi v. Children's Mem. Med. Ctr., 134 F.3d 1302, 1305 (7th Cir. 1998). In law, the inclusion of reservation of rights clauses in an agreement accurately conveys that benefits may be altered or terminated. Thus, the plaintiffs' fiduciary duty claim fails.

IV. Conclusion

This story does not have a happy ending. What this case comes down to, in the end, is the distinction between "lifetime" and "vested" welfare benefits--a legal distinction that understandably escaped many of Continental's employees who elected to take early retirement under the VSRP. It is also a distinction that, as we have pointed out above, only relatively recently became important. But now this legal distinction has indeed become an important one, because the lack of a writing that expressly vests the "lifetime" HCA benefit combined with Continental's reservation of the right to terminate benefits means that the plaintiffs' claims of wrongful denial of benefits, breach of contract and estoppel must fail. As for the plaintiffs' fiduciary duty claim, we agree with the district court's observation that, in hindsight, Continental would have better served its employees by proactively clarifying its intent with respect to the HCA benefit during the time its employees were deciding whether to take early retirement under the VSRP. Its failure to do so has left the plaintiffs, and undoubtedly many other long-time former Continental employees, feeling betrayed. However, we also agree with the district court that, at least in this circuit, Continental's failure is not actionable as a breach of fiduciary duty. For the foregoing reasons, the district court's grant of summary

judgment to the defendants on all of the plaintiffs' claims must be

AFFIRMED.

Footnotes

n1 Count I, which was essentially redundant of Count II, was withdrawn by the plaintiffs.

n2 CNA disputes that any formal meetings were scheduled and claims that Heidemann conducted group meetings in her region on her own initiative. (Appellees' Br. at 14-15.) CNA moreover argues that the plaintiffs submitted 23 legally defective affidavits of other early retirees claiming they also attended meetings in other parts of the country during which the HCA benefit was described as "lifetime." *Id.* at 17. We need not decide whether these affidavits were defective or not, nor whether additional meetings occurred or not, because, as we point out later, CNA admits that the HCA benefit was a "lifetime" benefit for all retirees, and the plaintiffs have not claimed that they were ever told explicitly that the HCA benefit could not be terminated or altered.

n3 Moreover, we note that although there are many more decisions reviewing a district court's *denial* of discovery than decisions reviewing a *grant* of discovery, apparently the requirement that prejudice be shown applies equally to parties aggrieved by a grant of discovery as by a denial. *See, e.g.*, Belcher v. Bassett Furniture Industries, Inc., 588 F.2d 904, 907 (4th Cir. 1978) (reviewing a grant of discovery, court held that "granting or denying a request under rule 34

is a matter within the trial court's discretion, and it will be reversed only if the action taken was improvident and affected substantial rights."), quoting Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure (3d ed. 1998) § 2006 ("A discovery order can always be reviewed on appeal from a final judgment in the case, even though it is difficult at that stage to show that the party has been prejudiced by the order . . ., and the harmless-error doctrine, together with the broad discretion the discovery rules vest in the trial court, will bar reversal save under very unusual circum stances.") (footnotes omitted). CNA, like the plaintiffs, fails to demonstrate how it was prejudiced by the district court's decision to expand discovery on the fiduciary duty claim.

n4 As we discuss in more detail below, the characterization of a benefit as "lifetime" can, absent a reservation of rights clause, indicate that the benefit is vested. However, the packaging of a welfare benefit with pension benefits does not on its own alter our presumption against vesting in the absence of express language to the contrary.

n5 We note, as an aside, that although "earned" might seem to connote "vested," the two are distinguishable (though related) concepts. In the context of claims to benefits related to a break in service, the Second Circuit has noted that "accrued" benefits refer to those normal retirement benefits that an employee has earned at any given time during the course of employment. 29 U.S.C. § 1002(23)(A); *see generally* Esden v. Bank of Boston, 229 F.3d 154, 162-63 (2d Cir.

2000). "Vested" benefits, on the other hand, refer to those normal retirement benefits to which an employee has a "nonforfeitable" claim; in other words, those accrued benefits he is entitled to keep. 29 U.S.C. § 1002(19).

McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 320 F.3d 151, 156 (2d Cir. 2003). Moreover, we have held that" 'accrued benefit' . . . has been interpreted to include retirement benefits and to exclude 'ancillary benefits not directly related to retirement benefits' like insurance or disability benefits." Heinz v. Cent. Laborers' Pension Fund, 303 F.3d 802, 804-05 (7th Cir.2002), *aff'd*, 159 L. Ed. 2d 46, 124 S. Ct. 2230, 2004 U.S. LEXIS 4028 (U.S. June 7, 2004). Thus, while the use of "earned" as applied to the maximum HCA benefit level might indicate poor drafting, it does not here indicate an intent to vest.

n6 The plaintiffs may have recognized this in their Statement of Undisputed Material Facts In Opposition to the Defendant's Second Motion for Summary Judgment. (*See* R. 117 at 5, P 19 ("The VSRP retirees were entitled to receive the maximum Retiree Health Care Allowance even if they had less than 25 years of service or were under the age of 62. This benefit was not offered under the general retirement plan.").)

n7 We note four references in the three page document. (Brief Description Newsletter, R. 109-2, ex. 12.) On page 1, it states, "the Retirement Plan's benefit formula for accruing your retirement allowance usually is a percentage of your average final pay over the last five years, multiplied by your years of service, but reduced if you want to retire before age 62. Under the [VSRP],

the following enhancements will apply." On page 2, it states that "under the Retirement Plan, your allowance is normally reduced . . . . But if you elect to retire through the [VSRP], these reduction factors will not apply." Later on the same page, it states, "in addition to these changes, we have already announced an expansion of the Retirement Plan's definition of pay." And on page 3: "In addition to the enhanced retirement benefits that are described above . . . ." Moreover, the VSRP would fail to qualify as an ERISA retirement program if it were comprised solely of the documents that specifically mentioned the VSRP and did not take as its baseline the general retirement plan's terms, procedures and benefit descriptions. *See* 29 U.S.C. §§ 1102(a)(1), 1024(a)(1) (requiring employee benefit plans to be governed by written plan documents filed with the Secretary of Labor).

n8 Even if the general retirement plan documents were inapplicable to the VSRP, the omission of a reservation of rights clause from the documents mentioning the VSRP would not necessarily operate to waive CNA's right to terminate or modify the HCA, which is an ERISA welfare benefit. *See, e.g.*, Gable v. Sweetheart Cup Co., 35 F.3d 851, 855 (4th Cir. 1994) (citing Wise v. El Paso Natural Gas Co., 986 F.2d 929, 938 (5th Cir. 1993) (holding that "silence" as to an employer's right to modify the plan does not" impliedly cede the right to later amend or discontinue coverage")).

n9 The 1990 Plan incorporates by reference the Plan's annual SPDs and "any changes announced in writing to Employees or to Retired Employees before the beginning of the calendar year, for the year in which the services are rendered." (1990 Plan § 4.2, at 15.) The

1990 Plan is the umbrella ERISA plan under which general retirement plan as well as the VSRP were both created. As the controlling document at the time the plaintiffs elected to accept the VSRP plan, we find that its reservation of rights clause also applies to the VSRP. In addition, since the SPDs are incorpo rated by reference into the 1990 Plan, any reservation of rights clauses in the SPDs available to the early retirees at the time the VSRP was offered are also applicable to the VSRP.

n10 We note in this regard that the plaintiffs merely incorporated their arguments made in support of their wrongful denial of ERISA benefits claim and did not add any separate legal or factual arguments. (Appellants' Br. at 36-37.) Moreover, the plaintiffs characterize their wrongful denial of benefits claim in Count II as an "ERISA Contractual Claim," *id.* at 27, quote from a decision involving interpretation of a written ERISA contract, *id.* at 28-29, and discuss the issue using contractual language such as "bargained . . . in consideration for," *id.* at 27, and "offered and accepted," *id.* at 32.

No. 98 C 7108

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MICHAEL J. VALLONE and JOYCE E. HEIDEMANN, and JAMES O'KEEFE, on behalf of themselves and all other plaintiffs similarly situated known and unknown,
Plaintiffs,

vs.

CNA FINANCIAL CORPORATION, a/k/a CNA Casualty of Illinois, and The CONTINENTAL INSURANCE COMPANY, and all their subsidiaries, parent companies, partnerships, and corporations,
Defendants.

March 28, 2003, Decided
March 28, 2003, Docketed

COUNSEL: For MICHAEL J VALLONE, JOYCE E HEIDEMANN, JAMES J O'KEEFE, plaintiffs: William J. Sneckenberg, Stuart Morris Brody, William J. Sneckenberg & Associates, Chicago, IL.

For CNA FINANCIAL CORPORATION, CONTINENTAL INSURANCE COMPANY, defendants: Thomas James Piskorski, Timothy F. Haley, Ronald J. Kramer, Beth Tracey Golub, Seyfarth Shaw, Chicago, IL.

JUDGES: JAMES B. MORAN, Senior Judge, U. S. District Court.

OPINION BY: JAMES B. MORAN

OPINION:

MEMORANDUM OPINION AND ORDER

This lawsuit is a purported class action brought on behalf of individuals who elected early retirement from the Continental Insurance Company in 1992. On December 28, 2000, we granted defendants' motion for summary judgment as to counts I, II, IV and V of plaintiffs' complaint. Vallone v. CNA Financial Corp., 128 F.supp2d 1131 (N.D.Ill. 2000). Plaintiffs have one remaining claim, breach of fiduciary duty in violation of Section 404 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1104. Defendants move for summary judgment. For the following reasons, defendants' motion is granted.

BACKGROUND

Plaintiffs are former employees of Continental Insurance Company (Continental) who elected to take early retirement from the company in 1992 pursuant to a Voluntary Special Retirement Program (VSRP). The VSRP offered special health care benefits that differed from the benefits extended to regular retirees under Continental's Comprehensive Health Care and Dental Plan (the Plan). One such feature involved the Retiree Health Care Allowance (HCA), a subsidy provided by Continental to help offset heath care costs.

The VSRP was formally introduced to human resource managers and officers in mid-October, 1991, at a three-day meeting in New York (New York meeting). The parties dispute whether statements were made during that meeting regarding whether the HCA was a benefit that could be eliminated, or if it was a lifetime benefit. Plaintiff Joyce Heidemann testifies that in her position as assistant vice-president of human resources, she attended the New York meeting and was told, along with about fifty other managers and officers, that the VSRP would include a lifetime HCA. She and her colleagues were then told to provide this information to all eligible employees within their regions. Plaintiffs offer supporting testimony from another employee that during October officers and senior mangers of Continental referred to the HCA as a lifetime benefit (Mostroberti dep., pp. 21-22).

On November 21, 1991, a packet of materials was sent to employees who were eligible to retire under the VSRP (def. exhs. 9-14). The packet included a brief description of the program, which refers the reader to Continental's general benefit guide, to determine the differences between the HCA and the company's alternative Retiree Health Care Contribution, the two options available to regular retirees in 1991. It then goes on to state that if "you take advantage of the [VSRP], the Company subsidy for your Retiree Health Care Benefits will be payable to you only as a Retiree Health Care Allowance." The packet also included an individual calculation worksheet that explained to each potential retiree that under the VSRP he would receive $ 465.00 per month until age 65 and "$ 180.00 per month thereafter" as his HCA. Additionally, the packet contained a copy of Continental's guide for employees

considering retirement in 1992, described in the cover letter of the packet as a guide that provides information about the benefits available during retirement.

Local meetings were subsequently held between human resources personnel and eligible employees to answer questions about the VSRP. One such meeting was held in Chicago and attended by plaintiff Michael Vallone. At that meeting, Joyce Heidemann presented the VSRP and, in response to a question about the HCA, allegedly responded that the HCA was a benefit for "your lifetime" (Vallone dep., pp. 77-79). Vallone's testimony that human resource personnel represented the HCA as a lifetime benefit is confirmed by deposition and affidavit testimony from other attendees at the Chicago meeting, as well as attendees at meetings in New Jersey, Pennsylvania, California, Hawaii, New York, Ohio, Kentucky, Georgia, Colorado and Texas (plfs. exhs. L, N, O, T, U, V, W, Y, Z, AA, BB, CC, DD, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP).

CNA Financial Corporation (CNA) acquired Continental in 1995. In August 1998, CNA informed all retired Continental employees that the HCA benefit would be terminated as of December 21, 1998. This termination of benefit affected all retirees, including those who retired under the VSRP. Some early retirees filed appeals contesting this decision, arguing that under the VSRP their HCA benefits were irrevocable. In February 1999, the Plan administrator denied their appeals, stating that early retirees were not provided with a lifetime health care allowance and that CNA's decision to terminate these subsidies was appropriate and final.

DISCUSSION

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). We draw all inferences and view all admissible evidence in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Some of the arguments presented in the briefs have already been addressed in our prior opinion, Vallone v. CNA Financial Corp., et al, 128 F. Supp. 2d 1131, 1134 (N.D.Ill. 2000). To summarize, nothing in the VSRP literature itself can reasonably be read to create a vested lifetime benefit in the HCA. 128 F. Supp. 2d at 1136. Continental's documents relating to the Plan for regular retirees, such as the summary plan description and the company's annual guides to benefits, contain reservation-of-rights clauses which give Continental the right to terminate or amend the Plan at any time. We determined that the VSRP should be read together with Plan documents since the VSRP materials and packet references these documents. *Id.* at 1137. It follows that the reservation-of-rights clauses contained in the Plan, giving Continental the right to terminate or amend the Plan at any time, also apply to the HCA under the VSRP. *Id.* The issue before us now, then, is whether in the face of the reservation-of-rights clauses the alleged oral representations that the HCA was a lifetime benefit constitute a breach of fiduciary duty.

ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). While not every misrepresentation regarding a plan is actionable, Frahm v. Equitable Life Assurance Society of the United States, 137 F.3d 955, 959-960 (7th Cir. 1998), widespread misrepresentation regarding benefits may violate ERISA fiduciary duties. Varity Corp. v. Howe, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996). Plaintiffs offer persuasive caselaw from other circuits which have dealt with similar facts and have supported claims for breach of fiduciary duty. *See e.g.* James v. Pirelli 305 F.3d 439 (6th Cir. 2002); Abruscato v. Empire Blue Cross and Blue Shield, 274 F.3d 90 (2nd Cir. 2002) (evidence of oral representations to plan participants that benefits were "lifetime" benefits was sufficient to create a genuine issue of material fact, despite evidence that they had also been advised in writing of a reservation of rights to terminate benefits); In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 57 F.3d 1255 (3rd Cir. 1995)(despite employer's right to terminate plans, fiduciary duty claim could go forward based on alleged representations and literature that benefits would continue for life when employer knew of retirees' confusion). Under these cases, plaintiffs' claim would likely survive this summary judgment motion.

ERISA fiduciary duty is not viewed as broadly in this circuit. In Frahm, *supra*, the Seventh Circuit considered allegations that advice was given to retirees which stressed the availability of lifetime benefits and did not state that these benefits could be terminated. 137 F.3d at 959. The court held that these allegations would not support a fiduciary duty claim, noting that in

the face of plan documents that stated otherwise, upholding oral representations of future benefits would be inconsistent with the more general ERISA principle of adherence to written plans. *Id.* at 960. Citing Varity, the court found that the allegations did not describe "a campaign of disinformation that led employees to surrender their benefits" and, accordingly, failed to support a fiduciary duty claim.

So what are the facts here? A Heidemann affidavit prior to her deposition could be construed as saying that she was told that the benefits were irrevocable and told to so advise employees. Defendants argue that her affidavit is inconsistent with her deposition and should be disregarded. We disagree. In her deposition she had no recollection of anyone saying the benefits were irrevocable. The subject did not come up. Rather, she believed that the VSRP was a separate and distinct plan and, in the absence of any representations to the contrary, the benefits were therefore irrevocable. That testimony is not inconsistent with her affidavit, which does not expressly state she was told that the benefits were irrevocable.

It is clear, from the perspective of the evidence most favorable to plaintiffs, that employees were told that the benefits were for them and their spouses' lifetimes, that they were not told that the benefits could be changed (although they were referred to documents that reserved the right to change benefits), that they were not told the benefits were irrevocable, that many employees therefore concluded that the benefits were irrevocable for reasons similar to Heidemann's reasons, that that conclusion was material to their decision to retire, that Continental had no then intention of

changing those benefits, and that the intention and decision to change benefits came several years later, after CNA acquired Continental.

In hindsight, it would have been far better if Continental had pointed out the fragility of those benefits during the six-week window for the VSRP, as it is obvious that its failure has left a bad taste in the mouths of many long-time and loyal former employees. But here Continental's failure was a failure to distinguish between its then policy to freeze retiree benefits and its legal obligation, which left it free to change its mind. It did not set out to deceive or disadvantage plan participants, and plaintiffs' claims are thus doomed by Frahm, *supra*.

CONCLUSION

Defendants' motion for summary judgment on the one remaining count is granted. Plaintiffs' motion for class certification is denied as moot.

JAMES B. MORAN

Senior Judge, U.S. District Court

No. 98 C 7108

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MICHAEL J. VALLONE and JOYCE E. HEIDEMANN, and JAMES O'KEEFE, on behalf of themselves and all other plaintiffs similarly situated known and unknown,
Plaintiffs,

vs.

CNA FINANCIAL CORPORATION, a/k/a CNA Casualty of Illinois, and The CONTINENTAL INSURANCE COMPANY, and all their subsidiaries, parent companies, partnerships, and corporations,
Defendants.

March 28, 2003.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion for summary judgment on the one remaining count is granted.

Date: 3/28/2003

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B – REGULATORY PROVISIONS
PART 4 – FIDUCIARY RESPONSIBILITY

§ 1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(I) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless

under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(Pub.L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub.L. 96-364, Title III, § 309, Sept. 26, 1980, 94 Stat. 1296; as amended Pub.L. 101-508, Title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388-565, 1388-566; Pub.L. 104-188, Title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799.)

No. 04-502

IN THE

Supreme Court of the United States

MICHAEL J. VALLONE, JOYCE E. HEIDEMANN, AND JAMES J. O'KEEFE,

Petitioners,

v.

CNA FINANCIAL CORP., A/K/A CNA CASUALTY OF ILLINOIS, AND THE CONTINENTAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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November 5, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court of appeals correctly held that there was no breach of fiduciary duty under Section 404 of ERISA, 29 U.S.C. § 1104, in this case where the Plan's language clearly reserved respondents' right to terminate petitioners' health benefit and there was no evidence either of an intent to mislead or even of any actual misunderstanding by the petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Continental Insurance Company is a wholly owned, second-tier subsidiary of CNA Financial Corporation. No publicly held company owns 10% or more of CNA Financial Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90 (2d Cir. 2001), *cert. denied*, 537 U.S. 1170 (2003) 6
Aetna Health Inc. v. Davila, 124 S. Ct. 2488 (2004) 4
Frahm v. Equitable Life Assurance Soc'y of the United States, 137 F.3d 955 (7th Cir. 1998) 6
James v. Pirelli Armstrong Tire Corp., 305 F.3d 439 (6th Cir. 2002), *cert. denied*, 538 U.S. 1033 (2003) 7
In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 57 F.3d 1255 (3d Cir. 1995) 6
Varity Corp. v. Howe, 516 U.S. 489 (1996) 7, 8

STATUTES

29 U.S.C. § 1104 ..... 1, 3
§ 1132(a)(1) 3

IN THE

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No. 04-502

MICHAEL J. VALLONE, JOYCE E. HEIDEMANN, AND JAMES J. O'KEEFE,

Petitioners,

v.

CNA FINANCIAL CORP., A/K/A CNA CASUALTY OF ILLINOIS, AND THE CONTINENTAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents CNA Financial Corporation and Continental Insurance Company hereby oppose the petition for a writ of certiorari filed by Michael J. Vallone, et al., seeking review of the judgment and opinion of the court of appeals in this case.

STATEMENT

Petitioners are three individuals who are former employees of respondent Continental Insurance Company. They seek review of the decision of the court of appeals that respondents Continental and its current parent, CNA, did not violate Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), when the latter exercised an express contractual reservation of the companies' right to terminate a discretionary health care benefit provided to Continental retirees, such as petitioners.

The petition makes only the most cursory effort to justify this Court's review and in the process identifies as its question presented an issue that is not posed by the holding below and relies upon an asserted conflict among the circuits without making any effort to show that this case is an appropriate vehicle for resolving any such conflict. In fact, there is no conflict over what "standard of proof" applies to breach of fiduciary duty claims under ERISA and this case is a wholly inapt vehicle for deciding any legal issue with regard to the proper interpretation of Section 404(a). Accordingly, the petition should be denied.

Continental is an insurance company that operates throughout the United States. It is a second-tier subsidiary of CNA, which acquired Continental in 1995. Pet. App. 3a. The three petitioners were employees of Continental and each of them accepted early retirement from Continental in 1992, pursuant to a Voluntary Special Retirement Program ("VSRP"). *Id.* Their retirement package included a Health Care Allowance ("HCA") that was described as providing a "'lifetime' benefit." They also were orally told that the HCA was a "'lifetime' benefit." *Id.* at 6a & n.2.

The HCA was not, however, offered to petitioners in a vacuum. During their employment, petitioners received health insurance benefits under a comprehensive plan that was adopted in 1990. Under the 1990 plan, Continental expressly reserved the company's right to amend or terminate all benefits. The Plan provided as follows: "The Plan may be amended or terminated at any time or from time to time by the Board of Directors of The Continental Corporation or the Compensation Committee of said Board." R. 109: Exh. 1, § 8.1.

Continental also provided petitioners with a Summary Plan Description in 1991 before they elected to take voluntary retirement. In that document Continental described the HCA as "individually determined, monthly dollar amounts [which are] based on length of service and age at retirement . . . [and

may be used] to reduce your contributions for [health insurance] coverage during retirement [or] to pay for qualified medical expenses . . . for you and your eligible dependents." R. 109: Exh. 4, pp. 2-19, 2-46; R. 108, ¶ 25. This summary plan description contained multiple reservation of rights clauses that clearly authorized Continental to amend or terminate health care benefits. Thus, in the section where the HCA is described, the Plan specifically states that "[t]he Company reserves the right to amend, revoke or suspend Medical Care coverage at any time." R. 109: Exh. 4, p. 2-26; R. 108, ¶ 28.

It was against this background that petitioners elected to retire early in 1992. In 1998, three years after CNA acquired Continental, respondents notified all Continental retirees, including those that retired pursuant to the VSRP, that the companies were exercising their right to terminate the HCA benefit effective January 1, 1999, and this litigation ensued thereafter.

2. Petitioners filed a putative class action in the United States District Court for the Northern District of Illinois on behalf of all early retirees under the VSRP. The complaint sought relief on four grounds: failing to pay benefits in violation of Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B); breach of fiduciary duty in violation of Section 404 of ERISA, 29 U.S.C. § 1104; breach of ERISA and common law bilateral contracts and promissory estoppel under state law. The class, however, was never certified and the claims of the three individual plaintiffs were dismissed by the district court on summary judgment. Pet. App. 40a-47a.

The court of appeals unanimously affirmed. Pet. App. 1a-39a. The court dealt with each claim for relief in turn. With regard to the assertion that respondents violated ERISA by failing to pay benefits, the court held that ordinarily employers are free to amend or terminate welfare benefits, unless there is clear evidence in the written plan documents that there is a vested right to a particular benefit. The court

held that the clear reservation of rights clause that accompanied the reference in the Plan to a "'lifetime'" benefit required the conclusion that the benefit had not vested at the time of petitioners' retirement. *Id.* at 16a. The court concluded that the relevant documents explain plainly that "the plan in its current iteration entitles retirees to health coverage for the duration of their lives and the lives of their eligible surviving spouses," but that these benefits "are subject to change at the will of [respondents]." *Id.* at 17a (quoting *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 704 (7th Cir. 2003)).

Next, the court of appeals rejected in short order petitioners' breach of ERISA and common law contract claims and an estoppel claim under ERISA. Finding the contract claims to be essentially a restatement of the wrongful denial of ERISA benefits claim, the court dismissed them as a matter of federal law for the same reason that the court rejected the wrongful denial count – there is no vested right to any benefit. Pet. App. 25a. To the extent that petitioners were seeking recovery independently under state law, the court concluded that such a claim is clearly preempted by ERISA under this Court's decision in *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004). Pet. App. 25a-26a. With regard to estoppel, the court held that "plaintiffs have not shown a knowing misrepresentation of fact" and that "the early retirees were not told explicitly that the 'lifetime' benefits were irrevocable," which the court found fatal to petitioners' claim. *Id.* at 28a.

Finally, the court rejected petitioners' claim that respondents had breached their fiduciary duties under Section 404 of ERISA. The court described the Seventh Circuit's rule as follows: "a breach of fiduciary duty exists if fiduciaries 'mislead plan participants or misrepresent the terms of administration of a plan.'" Pet. App. 30a (quoting *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993)). Further, the court recognized that "'fiduciaries must

communicate material facts affecting the interests of plan participants or beneficiaries'" and this duty exists whether the fiduciary is asked for the information or not. *Id.* (quoting *Bowerman v. Wal-Mart Stores*, 226 F.3d 574, 590 (7th Cir. 2000)).

The panel held that respondents fulfilled these duties. First, the court found that "there is simply no evidence that Continental set out to deceive its employees by its actions." Pet. App. 33a. The court then observed that "it is not even clear that the information provided was inaccurate." *Id.* Here again, the court of appeals turned to the record and found: "no evidence that any employee ever specifically asked about the irrevocability of the HCA benefit, that [respondents] falsely indicated to any employee that the HCA benefit was irrevocable or that [respondents were] aware that the early retirees were coming to the mistaken conclusion that 'lifetime' equated to 'vested.'" *Id.* And finally, the court observed that only "accurate written information" was provided to petitioners, which doomed petitioners' fiduciary duty claim. *Id.*

ARGUMENT

The holding of the court of appeals in this case does not conflict with the holding of any other court of appeals and is fully consistent with this Court's decisions interpreting Section 404 of ERISA. The decision below turns on a narrow set of facts – respondents' reserved their rights in the same plan document that created the HCA benefit that was terminated and respondents neither misrepresented the nature of the benefit nor were even "aware" that petitioners may have labored under any "mistaken conclusion" about the nature of the HCA benefit at issue. This inherently fact-intensive ruling poses no issue that warrants this Court's review. Accordingly, the petition should be denied.

1. Petitioners do not challenge the holding of the court of appeals that the Plan unambiguously reserved respondents' right to terminate the HCA benefit. Thus, the only issue is whether the court of appeals properly applied Section 404 of ERISA to the undisputed facts of this case as described by the court of appeals.

Petitioners make little effort (Pet. 5-8) to show any actual conflict in decisions among the Circuits that would be relevant to the proper resolution of this case. To be sure, the panel acknowledged that its prior opinion in *Frahm v. Equitable Life Assurance Society of the United States*, 137 F.3d 955 (7th Cir. 1998), announced a rule that was less favorable to plan beneficiaries who are offered "lifetime" benefits than the approach followed in other Circuits. Pet. App. 15a. But this is not the *Frahm* case. This case follows, a fortiori, from *Frahm* and there is no basis for believing that any other Circuit would have decided this case differently.

For instance, the Second Circuit in *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 102-03 (2d Cir. 2001), *cert. denied*, 537 U.S. 1170 (2003), merely remanded for further proceedings in light of the plaintiffs' claims that the defendants had "repeatedly provid[ed] misleading information about 'lifetime' life insurance benefits." In so holding the court followed the Third Circuit's approach in *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255, 1264 (3d Cir. 1995), also relied upon by petitioners (Pet. 7), that a breach of fiduciary duty under ERISA exists "when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm." 274 F.3d at 103 (internal quotation marks omitted) (quoting *Kunkel v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001) (quoting *Unisys*, 57 F.3d at 1264)). By contrast here, the court of appeals specifically found no evidence that respondents had made any false statements about the nature of the benefit or were even

aware that there was any misunderstanding by petitioners. Pet. App. 33a. Thus, the kind of conduct that the Second and Third Circuits suggested might trigger liability in *Unisys* and *Abbruscato* simply is not involved in this case.

Petitioners' reliance (Pet. 7) on the Sixth Circuit's decision in *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 453-56 (6th Cir. 2002), *cert. denied*, 538 U.S. 1033 (2003), is even more misplaced. The court below properly recognized that the fiduciary in *Pirelli* "misrepresented to employees that a reservation of rights clause in the plan did not allow retirement benefits to be changed when the legal effect of the clause would be precisely the opposite." Pet. App. 29a-30a (citing *Pirelli*, 305 F.3d at 455-56). Here, there were no misrepresentations; indeed, the reservation of rights clause was included with the description of the HCA, which made clear that petitioners' had no vested rights to the HCA benefits, a point petitioners do not now contest.

In sum, there simply is no reason to believe that any other Circuit would have decided this case any differently than the way the Seventh Circuit did. Where, as here, the plan was unambiguous in reserving respondents' right to terminate the HCA and no misrepresentation was made by respondents, there is no basis for liability under Section 404 of ERISA. The most that can be said is that the case was easier to decide in respondents' favor in the Seventh Circuit, but the fact remains it would have been decided the same way in the other Circuits as well. In all events, the holding of the court of appeals in this case does not warrant further review by this Court.

2. Almost as an afterthought, petitioners suggest that the court of appeals somehow misinterpreted this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996). Specifically, they argue that the court of appeals has limited *Varity* to "situations where there are outright lies to employees." Pet. 10. But this is a plain misreading of the opinion below. As the court explained (Pet. App. 30a),

fiduciaries have an affirmative duty to "communicate material facts affecting the interests of plan participants" and this duty exists whether anyone asks for information or not. Thus, the court of appeals clearly does not read the fiduciary's duties under ERISA as interpreted in *Varity* narrowly.

Moreover, this Court in *Varity* ruled narrowly that "'[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.'" 516 U.S. at 506 (alteration in original) (quoting *Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)). Thus, even if the court of appeals had limited liability under Section 404 to deliberate misrepresentations, that would have done no violence to this Court's previous holding.

Petitioners attempt to read *Varity* more broadly by suggesting that it incorporates common law trust principles into ERISA. But this Court expressly declined to decide to what extent, if any, trust principles do more than inform the proper interpretation of ERISA responsibilities. *Id.* The Court recognized that the common law provides a starting point, but refused to decide whether ERISA necessarily is co-extensive with the common law. *Id.* ("[W]e need not reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries."). Of course, the Seventh Circuit explicitly has decided the issue left open in *Varity* and held that fiduciaries do have an affirmative duty to disclose material information truthfully whether in response to an inquiry or not. Certainly, petitioners are not challenging that rule.

* * * *

It may well be that this Court sometime in the future will have to decide when liability arises under Section 404 of ERISA in the context of a "lifetime" welfare benefit that has not been properly explained to plan beneficiaries and participants. But this is not the time and this is clearly not the

case. Here, it is plain that petitioners' HCA benefits as part of the VSRP were clearly described to them as subject to modification or termination and nothing was said either in writing or orally by respondents to the contrary. No court has found liability on these facts and therefore this case does not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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